(1)- S.B. Civil Misc. Appeal No.1369/2006
(State of Rajasthan & Anr. Vs. Poonam Chand Labana)

(2)- S.B. Civil Misc. Appeal No.1177/2006
(M/s. Maya Construction Vs. Poonamchand Labana & Ors.)

Date : 26.10.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. Arun Bhansali, for the appellant
Mr. H.R. Soni, Addl. Government Advocate for the State
Mr. J.P. Joshi, for the respondents.

These two appeals are against the order of the trial court dated 7.8.2006 by which the learned trial court allowed the plaintiff's application filed under Order 39 Rule 1 & 2 CPC and directed the State to allow the plaintiff-applicant to participate in the proceedings for award of the Contract No.19 dated 25.4.2006 for the relevant work mentioned at Sr. No.92 and another Work No.93.

Brief facts of the case are that undisputedly the plaintiff Poonam Chand Labana was partner of M/s Maya Construction, Dungarpur upto 1.12.2005. On 1.12.2005, plaintiff-Poonamchand Labana retired from the said firm and after induction of a new partner, the said firm M/s Maya Construction continued their work. A notice was published inviting tender for several works by Public Works Department for which only contractor of Class “A” were eligible to offer their bid. To qualify for award the

bidder was required to fulfill the condition mentioned in Clause 4.4A as well as other conditions mentioned in the tender document. As per Clause 4.4A the bidder should have in the past five years :- (a) Achieved in any one year a minimum financial turnover (in all cases of civil engineering construction work only) volume of construction work of at least the amount equal to the estimated cost of works (excluding maintenance cost for five years) for which did has been invited. There is another relevant condition is condition No. 4.6 providing formula for evaluation of capacity of bidder which formula has been explained under Clause 4.6(A) itself. There are other conditions also but for present controversy other conditions are not very much relevant.

The plaintiff after retirement constituted firm M/s Nayak Construction, Dungarpur. The plaintiff-respondent's case is that if the turnover and work experience of M/s Maya Construction for the period when he was partner is taken into account, the plaintiff is eligible to offer his bid. The defendant-appellant state as well as the intervener appellant M/s Maya Construction Company's plea is that the plaintiff was not eligible for the contract because of the reason that after retiring from M/s Maya Construction the plaintiff cannot claim any advantage of work or turnover of firm. Therefore, the plaintiff has no requisite work experience nor has requisite turnover.

It will worthwhile to mention here that M/s Maya Construction, continuing firm or any of its existing partners of the said firm were not made party in the suit. Anticipating any adverse order one of the partner of M/s Maya Construction, Dungarpur submitted an application for being impleaded as party under Order 1 Rule 10 CPC, that application as dismissed by the trial court by separate order dated 1.8.2006. However, the trial court exercising power under Order 1 Rule 8(a) CPC allowed M/s Maya Construction to put their case only on legal issues.

The learned court below after hearing of the parties, plaintiff and the State on all questions of facts and law and M/s Maya Construction only on legal issues allowed the injunction application filed by the plaintiff-respondent. The trial court held that M/s Maya Construction had turnover of Rs. 64.20 lacs in financial year 2004-2005 and in financial year 2005-2006 Rs.2,63,20,000/- approximately. The learned court below further held that since in relevant year the plaintiff was partner in M/s Maya Construction, therefore, he is also entitled to claim the benefit of experience which he acquired when he was partner in M/s Maya Construction and also entitled to take benefit of said firm's turnover.

Being aggrieved against the order of the trial court

dated 7.8.2006 intervener M/s Maya Construction Company and the State both prefer these two separate appeals.

Learned counsel for the appellant M/s Maya Construction, who has impleaded as intervener by the court below to argue on legal issues submits that the work experience and turnover of one of the partner who retired from the firm cannot be taken into account particularly when firm itself is running firm having retired partner no status in the firm. It is also submitted that even otherwise if the total turnover of the year 2005-2006 is excluded from consideration because of the reason that the plaintiff retired before completion of the period of financial year 2005-2006 then the plaintiff is not eligible to offer bid for the contract and, therefore, the trial court has committed serious error of law in granting injunction and issuing direction to the State allowing the plaintiff to take part in the bid in question.

The order under challenged is liable to be set-aside only on the ground of not giving opportunity of hearing to the appellant – M/s Maya Construction by the court below for the simple reason that core issue involved in the controversy was working experience and financial status of M/s Maya Construction and the plaintiff claimed the benefit of work done by him as partner of M/s Maya Construction and also claimed his eligibility on the basis of financial

standing as partner of M/s Maya Construction. The trial court itself allowed M/s Maya Construction to contest the injunction application but only on legal issues despite the fact that the plaintiff who was not partner in M/s Maya Construction at the time of issuance of notice inviting tender has raised his claim for the work contract in question against the existing and running from M/s Maya Construction. By permitting the plaintiff to take part in tender proceedings, the Court allowed the plaintiff to obtain the work order on the basis of work of M/s Maya Construction and that may result into denial of work order to M/s Maya Construction itself. The only M/s Maya Construction could have placed on record relevant material with respect to the working of M/s Maya Construction for past five years and could have submitted facts on the basis of which M/s Maya Construction seek exclusion of plaintiff from tender proceedings so as to claim their own right to obtain the work contract.

This Court finds that there was no reason for the court below to deny such a party M/s Maya Construction to put their case on facts. There appears to be no reason for impleading the appellant M/s Maya Construction as party only to address on legal issues in a civil original suit for grant of injunction. At this juncture, it may be observed that the court below could not have anticipated what the defence will be raised by M/s Maya Construction in

reply to the suit and injunction application filed by the plaintiff, the ex-partner of M/s Maya Construction.

In view of the above this Court is of the view that firstly, the court below has committed error of law by not impleading M/s Maya Construction as party in the application for grant of injunction and secondly, the court below has failed to apply its mind on the question whether the issues which will come for consideration of the Court while deciding the injunction application involving the working and financial status of the firm,could have decided question of fact in absence of the firm itself as party.

Learned counsel for the respondent submits that the applicant M/s Maya Construction submitted an application for becoming party and that was rejected by the court below by order dated 1.8.2006 and they have not challenged the said order by filing writ petition or even by challenging the order dated 1.8.2006 in their appeal and preferred to challenge the trial court order dated 7.8.2006 for granting injunction.

Learned counsel for the appellant M/s Maya Construction submitted that their application for becoming party was dismissed by the trial court on 1.8.2006 and the injunction application was decided on 7.8.2006 and therefore, in such

a short period the appellant could not have challenged the order when in the opinion of the appellant M/s Maya Construction they could have challenged the order dated 7.8.2006 as aggrieved person as well as because of the reason that their presence was felt necessary by the court below by allowing them to argue the matter on question of law.

It is true that the appellant has not challenged the order dated 1.8.2006 by which the trial court rejected their application under Order 1 Rule 10 CPC but this Court finds that the presence of M/s Maya Construction in the suit as well as in the proceedings for granting of temporary injunction was necessary. Even the proper party could have been impleaded but hear is a case of absence of necessary party and it is necessary that M/s Maya Construction be heard for deciding the injunction application as well as for the purpose of deciding the suit on merits.

In view of the above legal position, this Court finds that order dated 7.8.2006 cannot be sustained as has been passed against a party who ultimately can be deprived of the benefit of the work experience and status acquired by there turnover by awarding the contract to rival bidder on the basis of the same work experience and turnover which is work experience of the firm M/s Maya Construction. The any

comment on the merits of the claims of the parties will certainly prejudice the case of the party, therefore, this Court cannot comment on merits of the case of any of the party and that stage has not come because the order is liable to be set-aside only on the ground of not providing opportunity of hearing to appellant - M/s Maya Construction.

Therefore, this court by exercising powers under Order 1 Rule 10 (2) CPC direct the appellant-plaintiff to implead M/s Maya Construction as party defendant and party as non-applicant in the suit and in the injunction application. The order dated 7.8.2006 is set-aside. The matter is remanded to the trial court for deciding the injunction application in accordance with law uninfluenced by any fact taken note of by this Court in this order or observation made by this Court while considering the status of M/s Maya Construction or of the plaintiff for the purpose of deciding whether presence of M/s Maya Construction in the suit is necessary or not.

Both the parties are directed appear before the trial court on 15.11.2006 by or before that M/s Maya Construction -appellant may file reply to the injunction application and relevant documents. The trial court thereafter proceed to decide the injunction application in accordance with law and they directed to decide the

injunction application on or before 27.11.2006 looking to the involvement of the work of public importance.

Consequently, S.B. Civil Misc. Appeal No. 1369/2006 becomes infructuous and S.B. Civil Misc. Appeal No. 1177/2006 is allowed and the impugned order is set-aside for the reasons mentioned above only.

Till the injunction application decided by the learned court below, the status quo shall be maintained and no work will be awarded to any of the party.

(PRAKASH TATIA)J.

RM/